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SUPREME COURT, U.S.

IN THE SUPREME COURT OF
THE UNITED STATES

NO. 75-817

THE STATE OF NEBRASKA, ex rel)
NEBRASKA PRESS ASSOCIATION;)
OMAHA WORLD-HERALD COMPANY;)
THE JOURNAL-STAR PRINTING CO.;)
NEBRASKA BROADCASTERS ASSOC-)
IATION; WESTERN PUBLISHING CO.;)
NORTH PLATTE BROADCASTING CO.;)
ASSOCIATED PRESS; UNITED PRESS)
INTERNATIONAL; NEBRASKA PRO-)
FESSIONAL CHAPTER OF THE SOCIETY)
OF PROFESSIONAL JOURNALISTS/)
SIGMA DELTA CHI; KILEY ARMSTRONG;)
EDWARD C. NICHOLLS; JAMES)
HUTTENMAIER; WILLIAM EDDY;)

Relators,)

vs.)

THE HONORABLE HUGH STUART,)
Judge, District Court of Lincoln)
County, Nebraska,)

Respondent.)

RESPONSE AND BRIEF
OF
ERWIN CHARLES SIMANTS

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Court has asked the respondent three questions raised by
the application of the Nebraska Press Association, et al, in the above entitled
matter. Those questions are:

1. Whether a stay of the order of the Nebraska Supreme Court
should be granted by the Supreme Court of the United States
and whether Justice Blackmun's order should be stayed.
2. Whether the documents filed with the Supreme Court by
the petitioners in the above entitled matter should be con-
sidered as a petition for a writ of certiorari.

3. Whether the matters on briefing and hearing of this matter before the Supreme Court of the United States should be expedited.

We address ourselves to each question separately.

I.

With regard to the question of whether a stay of the Nebraska Supreme Court should be ordered, it is agreed that there have been procedural irregularities and exceptions to this point to normal procedures both before the Nebraska Supreme Court and before this Court. We submit that a stay of the orders heretofore granted by any of the Courts should not be granted because, as set forth in respondent's brief in the Nebraska Supreme Court, the matter involved here is essentially criminal in nature and affects the defendant's rights pursuant to the Fifth and Sixth Amendments of the Constitution of the United States and Article I, Section 11 of the Constitution of the State of Nebraska. The initial approach to the problem with regard to pre-trial publicity by the respondent in consenting to the prosecution's motion for restricted press coverage and moving further for closed pre-trial hearings was to protect his right to secure an impartial jury. Under Nebraska law, Section 29-1301, R.R.S. 1943, as amended, provision is made that the defendant shall be tried in the county of his residence or if a motion for a change of venue supported by proper affidavits is successful then the matter shall be moved to "some adjoining county" - Section 29-1301, R.R.S., supra. The defendant's rights to due process of law, both under the laws of the State of Nebraska and under the Constitution of the United States are directly in question here. A principal part of due process being the ability to select a fair and impartial jury in the county where the offense had been allegedly committed. While this matter coming before this Court is apparently unique in the fashion it was brought before the Court, it would appear that the respondent in this matter should be entitled to the procedural due process provisions of Section 28-1257, USCA, and

Section 28-2101, USCA, and the supporting Rules of the Supreme Court of the United States, specifically Rules 18(2), 27, and 51 (1) and (2). Sincy any order entered by this Court prior to the time of respondent's trial commencing January 5, 1976 would materially affect that trial and would be an integral part of the pre-trial proceedings leading up to the actual trial itself.

Petitioners maintain their application before this Court unless granted will irreparably injure the petitioners and prevent them from gathering, printing, and receiving important pre-trial information. We submit that since the orders in question here, the order of Judge Hugh Stuart of the Thirteenth Judicial District of Nebraska and the Nebraska Supreme Court and the order of Justice Blackmun affect the pre-trial publicity that could affect the trial here, the orders of these Courts are a part of due process to which the respondent is entitled. In that he must place reliance upon the rules, regulations, and statutes as they affect his trial in the pre-trial stages. Section 28-2101 (f), USCA, provides:

"* * *for a stay of an order pending the obtaining of a writ of certiorari from the Supreme Court and such order may be stayed by a Justice of the Supreme Court." (Emphasis supplied.)

Further, Rule 51 of the Supreme Court Rules provides:

"1. Stays may be granted by a Justice of this Court as permitted by law; and writs of injunction may be granted by any Justice in cases where they might be granted by the Court* * *".

And such Rule further provides:

"2. All applications for stays or injunctions made pursuant to this or any other rule must show whether application for the relief sought has been made to the appropriate Court or Courts below or to a Judge or Judges thereof and shall be submitted as provided in Rule 50 * * *."

The above Rule refers back to Rule 18(2) and 27. It is, first of all, submitted here that this matter has already been entertained by Justice Blackmun of this Court and an order issued by him remanding certain matters to the Nebraska Supreme Court. The Nebraska Supreme Court has issued an order and opinion regarding this matter and has further remanded some of the portions of this matter back to

the District Judge of the Thirteenth Judicial District in Lincoln County, Nebraska. It is submitted here that the petitioners herein have had this matter considered by one Justice of the United States Supreme Court as provided by Section 28-2101 and the accompanying Rules. The record herein does not show that the petitioners herein have filed an application for a stay of the order of the Supreme Court of the State of Nebraska; therefore, no compliance has been made with the Rules of the Supreme Court of the United States or of the applicable Statutes and that, therefore, a stay should not be granted. Since the situation here involves questions of great constitutional magnitude - that is the balancing of the interests between the First and Sixth Amendments of the Constitution of the United States. We submit to the Court that allowing a stay of any of the orders entered thus far are such as could greatly jeopardize the respondent's ability to obtain a fair and impartial trial in Lincoln County, Nebraska or in any of the adjoining counties. As is shown by the matters on file before the Court, Lincoln County, Nebraska is a County with a population of approximately 30,000 individuals and the surrounding counties are even less populated making the selection of a jury that much more difficult. Since it appears from the above statutory provisions and Rules of the Supreme Court as cited that a stay in this matter can be issued only by one Justice and that the petitioners herein have not complied with the rules of obtaining such a stay in this instance and since it appears from the statutory provisions and from the rules that it is the duty of one Judge to enter the stay rather than the entire Supreme Court and, further, since the respondent herein is relying upon the orders as heretofore entered both by the single Justice of the Supreme Court of the United States and the Supreme Court of the State of Nebraska in making pre-trial preparations a stay of the order at this point in time would greatly jeopardize his rights to due process and the obtaining of a fair and impartial trial in Lincoln County, Nebraska. We, therefore, ask that the Court not enter a stay of either the order of Chief

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Justice Blackmun, the Nebraska Supreme Court, or Judge Hugh Stuart of the Thirteenth Judicial District of Lincoln County, Nebraska.

2.

The second question to which we address ourselves is as to whether or not the documents herein are filed with the Supreme Court of the United States should be considered as a petition for a writ of certiorari, we submit to the Court that the documents heretofore on file with the Court are not such as can be considered for a petition for a writ of certiorari. Rules 22 and 23 of the Supreme Court Rules specifically apply with regard to petitioning the Court for a writ of certiorari and the petitioners have not complied with the Rules of the Court and the applicable statutory provisions. Further, Rule 24 provides for the filing of briefs by the respondent. His attorneys are at the present time in the process of preparing for trial, which trial is schedule to commence in the Lincoln County District Court on January 5, 1976 and Rule 24 of the Court provides that counsel for the respondent shall have 30 days for making response to the petition filed for a writ of certiorari and must necessarily rely upon the applicable statutory provisions and the Rules of the Court in making response to the question here. While the question involved is one which only leads up to the trial of the defendant here in the Lincoln County District Court, it is submitted that prior to the time of the trial herein scheduled for January 5, 1976, it is necessary for the respondent to file various pre-trial motions such as a motion for change of venue, motion to suppress any evidence, motion in limine, and other motions and in the preparation of these motions he is essentially in a position of relying upon the orders of the various Courts as heretofore entered. Since the various matters now on file with the Court do not conform with the Rules applying to petitioning the Court for a writ of certiorari that the respondents herein be required to come with such Rules and to follow the normal statutory provisions and the Rules of the Court in making their application for a writ of certiorari. In the event that the

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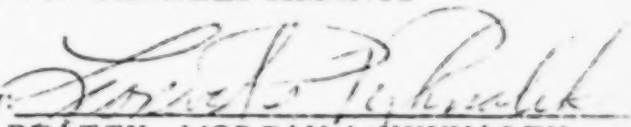
Court does feel that the documents here on file should be treated as a petition for a writ of certiorari, then it is submitted that the respondent herein should be allowed to provide briefs in opposition within the 30 day period as required by Rule 24 of this Court.

3.

In answer to the question as to whether the briefing and hearing should be scheduled on an expedited basis, it is submitted that the various rules providing for the filing of briefs in the Supreme Court of the United States make no provision for expediting the time of filing such briefs and in fact such rules, specifically Rule 24, provides that the normal 30 day requirement for the filing of reply and supplemental briefs may be enlarged. While the Rules provide for the enlargement of time in which to file briefs there is no provisions for accelerating such briefing times or the hearing time. In line with our argument here, to expedite this matter would in fact constitute a denial of due process as far as the respondent is concerned; we ask that the Court follow the usual time requirements applying to a petition for a writ of certiorari.

Respectfully submitted,

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